

WATER COUNCIL MEETING

Dept. of Environmental Services
29 Hazen Dr., Concord, N.H.

September 8, 2004
9:00 a.m.

Members present: Councilors Bridges, Bradley, Butler, Cowan, Frost, Ingham, Lussier, Patenaude, Phillips, and Varotsis

Members absent: Councilors Barrett, Densberger, DiMarzio, Dupee, Glines, and McLeod

Chairman Bridges opened the meeting at 9:00 a.m.

1. Approval of Minutes of August 11, 2004 Meeting

A motion was made by Councilor Bradley to accept the minutes of the August 11, 2004 meeting as presented. The motion was seconded by Councilor Butler and unanimously voted.

2. Approval of State Aid Grants

Steve Snell of the Wastewater Engineering Bureau requested approval of five state aid grants as set forth in a memo from Bureau Administrator John R. Bush, P.E. to Harry T. Stewart, P.E., Director, Water Division dated August 30, 2004.

Councilor Butler moved to approve the grants and recommend favorable action by the Governor and Executive Council by adoption of the following resolution in its entirety. Councilor Bradley seconded the motion and it was unanimously voted.

WHEREAS, The following municipalities have applied to the Department of Environmental Services, under the provisions of RSA 486, for grants in the amounts listed to aid in the defraying of the costs resulting from the construction of sewage disposal facilities, as defined in said Chapter:

<u>MUNICIPALITY</u>	<u>PROJ. NO.</u>	<u>PROJECT DESCRIPTION</u>	<u>AMOUNT</u>
Woodstock	C-676	Secondary Clarifier	\$262,101
Greenville	C-677	Wastewater Treatment Plant Improve.	176,829
Beebe River Village	C-678	Wastewater Improvements, Phase I	14,230
Concord	C-679	WWTF Chlorination Improvements	36,012
Dover	C-680	Wastewater Treatment Plant Outfall Upgr	59,421

WHEREAS, The Department of Environmental Services has examined said applications as to the eligibility of the construction costs for State contributions; and

WHEREAS, The Water Council finds that said projects are intended to control or reduce pollution in the surface waters of the State as defined in RSA 485-A;

NOW THEREFORE, The Water Council finds that all of the provisions of RSA 486 have been met by said applicants and respectfully recommends that the Governor and Executive Council approve said grants and authorize payment thereof through the Department of Environmental Services as provided for in said Chapter.

3. Status of Appeals

Michael Sclafani distributed an Appeals Status Report and reviewed pending appeals with the Council.

- **Docket No. 03-10 WC - Appeal of Conservation Law Foundation**
A stay remains in effect on this appeal pending the outcome of a Wetlands Council appeal of a water quality certificate. The Wetlands Council appeal is currently scheduled to be heard on October 26, 2004.
- **Docket No. 03-14 WC - Appeal of Gerald A. Bell**
A stay remains in effect on this appeal pending the resolution of a declaratory judgment action before the Merrimack County Superior Court.
- **Docket No. 04-05 WC - Appeal of Freudenberg-NOK General Partnership**
A stay remains in effect until September 14, 2004.
- **Docket No. 04-14 WC - Appeal of Mark and Marianne Bonaiuto**
The written Decision & Order to waive Env-WC 203.02 and to dismiss this appeal is in draft form awaiting review by council's attorney.
- **Docket No. 04-15 WC - Appeal of Town of Nottingham Selectmen**
Action on this appeal was stayed at the August meeting pending receipt of a written opinion from council's attorney, which has not been received.

Councilor Butler made a motion to table action on this appeal until the council receives a written opinion from Attorney Edwards on issues of standing. Councilor Bradley seconded the motion and it was unanimously voted.

Tupper Kinder, Esq., counsel for the Town of Nottingham Selectmen, advised that no water is being withdrawn by USA Springs at the present time. USA Springs is in the process of remediating contamination from an adjacent property that extends onto USA Springs' property. Before being able to withdraw additional water under the terms of the permit, USA Springs will have to obtain another permit under Env-Ws 389 for a bottled water source.

Councilor Varotsis indicated that he received a letter addressed to "Nottingham Neighbors" signed by the CEO and President of USA Springs, Inc., Francesco Rotondo, indicating that USA Springs was approved by state regulators.

Richard Killion, a consultant to USA Springs, added that the process is now at the local planning board for review.

- **Docket No. 04-16 WC - Appeal of Tourettes Trust**

On August 11, 2004 the council voted to accept the appeal. On September 3, 2004, appellant filed a settlement agreement and release. The administrative order which was the subject of the appeal has been withdrawn by DES.

Councilor Cowan made a motion that the council direct Mr. Sclafani to obtain a written withdrawal of the appeal. Councilor Butler seconded the motion and it was unanimously voted.

- **Docket No. 04-17 WC - Appeal of Save Our Groundwater "SOG"**

This is an appeal of the July 1, 2004 Large Groundwater Permit Approval (LGWP 2004-0003) issued to USA Springs and the August 9, 2004 denial by DES of SOG's Motion for Adjudicative Hearing. The appeal was filed on August 24, 2004. On August 31, 2004, Attorney Richard Head filed an appearance on behalf of DES and a Motion to Dismiss. Appellant filed a revised notice of appeal on September 1, 2004.

Councilor Varotsis made a motion to table action on this appeal pending a written opinion on issues of standing from council's attorney. Councilor Bradley seconded the motion and it was unanimously voted.

4. Shoreland Protection Act Presentation

Attorney Jennifer Patterson, Chief of the Environmental Protection Bureau, Attorney General's Office, distributed a legal opinion on the Shoreland Protection Act ("SPA"). DES specifically requested clarification on two issues:

1. **Level of Review by DES**

Whenever an application for a permit is received, DES must determine whether the project being proposed falls within protected shoreland and, if so, DES will need to assess whether the work meets the minimum shoreland protection standards. The SPA is an overlay to the existing permitting system within DES and to municipal zoning and the law requires that any permit issued by DES or by a municipality must be consistent with the SPA. Currently, there is no separate SPA permit required. When the SPA was originally passed a separate permit was required; but before the act actually took effect, that provision was changed.

2. **Precedence of Municipal Ordinances**

The only circumstance under which a municipal ordinance takes precedence over the SPA is when that ordinance has been certified by the Office of Energy and Planning ("OEP"). If a written certification by OEP is in place, then the SPA does not apply in that municipality. There is an exception, however, with regard to setbacks. The standard setback under the SPA for primary structures is 50' from the reference line. Prior to the 2002 amendment to the SPA, municipalities could establish their own primary building setbacks. If a municipality adopted a shoreland setback prior to January 1, 2002, that setback will remain in place in that municipality, but all other components of the SPA will apply. If a community has OEP certification, then none of the provisions of the SPA apply.

Tourrettes Trust In response to councilors' questions, Attorney Patterson indicated that the Tourrettes case involved the 2002 amendment to Section 11 of the SPA regarding previously existing structures. Prior to the 2002 amendment an existing structure could be repaired, improved or expanded. The amendment which took effect in July of 2002 changed that provision so that an existing nonconforming structure can be torn down and replaced but no expansion beyond the outside dimensions of the original footprint is allowed. There was confusion in the Tourrettes case about which law applied as the application process originated in 2002 before the amended law took effect. There was also confusion about whether the town ordinance took precedence over the SPA. Town approvals were obtained; however, the state law continued to apply since the town had not received certification by OEP. Accordingly, the Attorney General's Office and DES determined that the administrative order should be withdrawn.

Attorney Patterson indicated that both DES and the Attorney General's Office were concerned about setting a precedent in this case and, therefore, a written legal opinion to clarify the SPA for the public and DES enforcement staff was produced.

Councilor Frost indicated that the purpose of OEP certification is to allow a municipality to take over jurisdiction of the CSPA. At this point, only the Town of Sunapee has received certification. In the remaining municipalities that have protected shoreland within their boundaries there is a concurrent jurisdiction with the state.

Attorney Patterson commented that the SPA applies to all land within 250' of a reference line of protected shoreland.

Council Jurisdiction Attorney Patterson noted that just as the SPA overlays the permit application process, the same is true of the appeals process. If an SPA issue arises from a wetlands permitting decision, the Wetlands Council has jurisdiction to hear the appeal. If an SPA issue comes up because of a site specific or subsurface permitting decision, then the Water Council has jurisdiction. Additionally, the Water Council has jurisdiction over DES enforcement actions under the SPA.

Mr. Stewart stated that in the future DES will require additional information up front in the permitting process (whether subsurface, site specific or wetlands) in order to determine whether a project will impact a protected shoreland. Also, education of DES staff and the regulated community will be undertaken.

5. MtBE Issues

Fred McGarry, Waste Management Division, discussed the impact of methyl tertiary-butyl ether (MtBE) on public water supplies in New Hampshire. MtBE is used both as an octane enhancer and an oxygenate in gasoline and is formed by reacting methanol with isobutylene. The 1990 Clean Air Act required that reformulated gas ("RFG") contain 2% oxygen by weight which results in 11% MtBE. In 1995 RFG was required to be used in four New Hampshire counties: Merrimack, Hillsborough, Rockingham and Strafford. A study completed by the DES Air Division in 2000 indicated that 5% of the gasoline being distributed in the remaining six NH counties met the requirements for RFG in the level of MtBE it contained.

The addition of MtBE to gasoline improves combustion efficiency, reduces emissions of carbon monoxide and benzene and helps to reduce ozone levels. However, other characteristics of MtBE contribute to water contamination. MtBE is highly soluble, it travels faster and greater distances through soil than other gasoline components, and it is not easily degraded by bacteria. MtBE also can permeate polyethylene and PVC pipes.

A study done at Paugus Bay found concentrations of MtBE at 7-8 ppb, which are attributed to old technology 2-stroke boat engines. The industry is switching to 4-stroke or fuel-injected 2-stroke engines to lower emission rates and all new engines will have to meet this requirement by 2006.

Another source of MtBE was discovered in a study done by the State of Connecticut which showed that fuel oil distributed in that state contained 10 to 906 mg/l ppm of MtBE. This was due to MtBE residue in tankers from the transportation of gasoline, which were then used to transport fuel oil. The significance of this study is that the Waste Management Division is seeing MtBE plumes from fuel oil spills.

Currently, there is no federal standard for MtBE in drinking water and the earliest that a standard will be adopted is 2010. New Hampshire and California have set standards at 13 ppb. In 2003, MtBE was detected in 15.7% of public water supplies statewide and in the four counties required to use RFG, the percentage jumps to 22.8%.

Mr. McGarry explained that the state has taken several steps to address the MtBE problem:

- The state has petitioned EPA to opt out of the RFG program.
- SB 397 would ban MtBE by January 2007 or 6 months after EPA approves a State Implementation Plan ("SIP"), whichever is greater. If EPA does not approve the SIP before July 2006, then the 2007 date will not apply and the process becomes dependent upon EPA approval of the SIP.
- The state has brought suit against twenty-two MtBE manufacturers.
- The Waste Management Division will be contracting with USGS to look at the entire state to get a snapshot of all public and private water supplies randomly selected in all ten counties to assess the overall extent of the problem.
- A consulting firm will be looking at water supplies that have been impacted by MtBE to come up with risk factors and to make recommendations to DES for siting new water supplies and for developing regulations in the Water and Waste Management Divisions.

An executive order issued in 2000 required that if a report came in at 5 ppb or greater, abutters within watershed protected areas were to be notified. The Waste Management Division has since sent out 127 notifications for any contaminant that showed up in a monitoring well or drinking water well above the drinking water standards. Of those notifications, 74% were based on MtBE detects. In the four RFG counties, 79% of the notifications were for MtBE. Of those notifications for MtBE, 78% showed MtBE present at or above 13 ppb.

Mr. McGarry explained that remediation for residential and public water supplies is activated carbon for concentrations below 100 ppb. Air stripping followed by activated carbon would be used for levels over 100 ppb.

The Waste Management Division has a gasoline remediation and elimination of ethers fund ("GREEF"), which is funded by ¼ cent per gallon levy on gasoline. From that fund, the division is able to subsidize the installation of private water supplies or treatment systems, primarily consisting of activated carbon and/or air stripping. GREEF is also available to pay for testing of public water supplies on a quarterly basis when MtBE is detected in the water. GREEF financed 50-55% of \$1.5 million for a water line extension in the Town of Salem to service approximately 120 private wells. The wells in this particular area of town had a 70% hit rate for MtBE, with a significant percentage at levels above the 13 ppb standard. The fund paid for hooking up individual homes to the public water supply if water in a private well tested above 13 ppb.

6. **Other Business**

There was no further business to come before the Council.

7. **Next Meeting**

The next meeting will be October 13, 2004.

8. **Adjournment**

A motion was made Councilor Bradley and seconded by Councilor Varotsis to adjourn. It was unanimously voted.

The meeting adjourned at approximately 10:45 a.m.